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Conference

1 UNITED STATES DISTRICT COURT  
2 SOUTHERN DISTRICT OF NEW YORK

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3 IN RE: TERRORIST ATTACKS ON  
4 SEPTEMBER 11, 2001,

03 MDL 1570 (GBD) (FM)

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5  
6 New York, N.Y.  
7 October 22, 2012  
8 10:20 a.m.

9 Before:

10 HON. FRANK MAAS,

Magistrate Judge

11 APPEARANCES

12 KREINDLER & KREINDLER  
13 Attorneys for Ashton Plaintiffs  
BY: JAMES KREINDLER

14 MOTLEY RICE  
15 Attorneys for Burnett Plaintiffs  
BY: ROBERT T. HAEFELE

16 ANDERSON KILL & OLICK  
17 Attorneys for O'Neil Plaintiffs  
and Plaintiff's Executive Committee  
18 BY: JERRY S. GOLDMAN

19 COZEN O'CONNOR  
Attorneys for Plaintiff's Executive Committee  
and Federal Insurance Brokers  
20 BY: SEAN P. CARTER  
SCOTT TARBUTTON

21 MARTIN F. McMAHON & ASSOCIATES  
22 Attorneys for Defendant IIRO, Muslim World League,  
Wael Jelaidan  
23 BY: MARTIN F. McMAHON

24 BERNABIE & KATZ  
Attorneys for Defendant AHIF  
25 BY: ALAN R. KABAT

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APPEARANCES (continued)

STEVE COTTREAU

RONIE BERGHOFFEN

Attorneys for Defendant Dubai Bank

OMAR MOHAMMEDI

Attorney for Defendant WAMY

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(In chambers)

THE LAW CLERK: Good morning.

This is Skylar, the judge's law clerk.

This is a conference in the matter of In Re:  
Terrorist Attacks on September 11th, 2001.

This conference is being tape-recorded.

Will counsel please state their name for the record.

MR. HAEFELE: Good morning.

It's Robert T. Haefele from Motley Rice for the  
Burnett plaintiffs on the PEC.

MR. KREINDLER: James Kriendler for the Ashton  
plaintiffs.

MR. GOLDMAN: Jerry Goldman for the O'Neil plaintiffs  
and the Plaintiff's Executive Committee.

MR. CARTER: Sean Carter for the Federal Insurance  
plaintiffs and the Plaintiff's Executive Committee.

MR. TARBUTTON: Scott Tarbutton for the Federal  
Insurance plaintiffs.

MR. COTTREAU: Hi. It's Steve Cottreau and Ronie  
Berghoffen for Dubai Islamic Bank.

MR. MOHAMMEDI: Omar Mohammedi, WAMY International.

THE COURT: Two people were talking over each other.  
We got Mr. Mohammedi's appearance. Whoever else was talking  
we didn't get.

UNIDENTIFIED SPEAKER: I'm not sure you heard, but

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1 that's Mr. Kabat, Alan Kabat that spoke.

2 THE COURT: Oh, okay.

3 Is there anyone else on the line?

4 MR. McMAHON: Yeah. My name is Martin McMahon.

5 I represent the International Islamic Relief  
6 Organization, the Muslim World League defendants, Wael  
7 Jelaidan, and Rabbitho Trust.

8 THE COURT: Anyone else?

9 Okay. I guess that's it.

10 I've read and reviewed the -- received and read, let  
11 me say, the letters from the Plaintiff's Executive Committee  
12 and from Clifford Chance, and the joint letter.

13 I guess the first issue is motions, where I understand  
14 the objection that plaintiffs had set forth argument, but it  
15 was helpful in terms of having some sense of the number of  
16 motions that might be filed and what they might relate to. And  
17 I guess the pitch certainly from plaintiffs is that given the  
18 need to translate documents, that the schedule ought to be  
19 modified from that which was originally proposed. So why don't  
20 we talk about that first.

21 Whoever is speaking for the plaintiff, just identify  
22 yourself.

23 MR. HAEFELE: Thank you, your Honor.

24 It's Robert Haeefele from Motley Rice.

25 I think our position would be consistent with what we

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1 had asked your Honor before. We think that the six-month time  
2 period would work well. And during that time period, I think  
3 what we'd like to do, also consistent with, I think, what your  
4 Honor's thoughts were at the February conference, was to do  
5 staggered motions and start getting some of the motions to you  
6 within the next month.

7 THE COURT: So you're proposing a deadline for motions  
8 of what?

9 MR. HAEFELE: I think a deadline to complete the  
10 motions within the six-month time period.

11 Again, our goal would be, I think, within the next  
12 month we can probably get a good number of those out to you,  
13 and then we would stagger the motions after that.

14 THE COURT: So you're talking about six months from  
15 today?

16 MR. HAEFELE: Sure.

17 THE COURT: April 20th? Did I do that right?

18 MR. HAEFELE: Yes. I guess that's -- that sounds  
19 right.

20 THE COURT: And I suppose then for each motion we  
21 should agree on a time period for a response. And then for  
22 reply papers, from the defendants' perspective, is three weeks  
23 okay?

24 MR. McMAHON: Your Honor, this is Mr. McMahon.

25 I think that's okay. I just want to go on record on

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1 something regarding the staggering concept, your Honor.

2 Since I have four players, I just hope I can be  
3 accommodated by the plaintiffs' lawyers that I'm not jammed up  
4 responding simultaneously to two motions.

5 MR. HAEFELE: Your Honor, I think while I'm somewhat  
6 sympathetic to Mr. McMahon's request I think we would note that  
7 to the extent we do that, we would surely be jammed up in  
8 responding to them. I'm not sure how that makes too much of a  
9 change for the schedule.

10 THE COURT: Let me assume that you folks can work it  
11 out. If you can't, certainly, Mr. McMahon, I'll entertain  
12 requests to modify the time for some of the motions, assuming  
13 you get hit with four all at once. Even if the motions are  
14 staggered, in all likelihood I'm going to wait until I have a  
15 few of them before I start issuing decisions for the same  
16 reason, namely, it will be easier for me to deal with them as a  
17 group.

18 MR. McMAHON: Thank you, your Honor. I think that  
19 should work then.

20 THE COURT: That was Mr. McMahon; correct?

21 MR. McMAHON: Yes, your Honor.

22 THE COURT: Be sure to state your name so the reporter  
23 can take it down.

24 MR. McMAHON: All right.

25 THE COURT: I think the only other issue for today is

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1 the privilege log; correct?

2 MR. HAEFELE: That is the only other issue that was  
3 raised, other than the scheduling issue, your Honor.

4 I think our position generally was though that we  
5 thought it really hadn't gone its course in terms of the meet  
6 and confer. And to the extent that your Honor was interested  
7 in addressing it, we thought it would be helpful to be able to  
8 brief it for your Honor.

9 THE COURT: And that's Mr. McMahon?

10 MR. HAEFELE: I'm sorry, that's Robert Haeefe.

11 THE COURT: Oh, okay.

12 Well, the last thing I want is briefing on how to do  
13 the privilege log. So let me hear from the defendants, and  
14 then I'll hear from you again, Mr. Haeefe.

15 MR. HAEFELE: Thank you, your Honor.

16 MR. COTTREAU: Judge, Steve Cottreau for Dubai Islamic  
17 Bank.

18 I'd like to speak to the issue of whether or not the  
19 defendants' counsels' communications need to be logged on a  
20 privilege log.

21 Plaintiffs have proposed -- and we completely agree --  
22 that they need not log their communications between the various  
23 counsels for the various plaintiffs on the theory that it's all  
24 work product protected, and most likely all joint defense  
25 privilege.

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1 We just want the same theory to apply to us.

2 We shouldn't have to go through thousands of attorney  
3 emails coordinating different hearings or coordinating strategy  
4 or other kinds of communications that are related to the  
5 litigation.

6 What the plaintiffs have proposed is that we keep  
7 those communications that don't have to be on the log within  
8 some narrow category that stem from the creation of the  
9 defendants' executive committee. But in order to do that, we  
10 still have to go through the thousands and thousands of emails  
11 that we all have in this case to see if they fit within the  
12 four narrow categories that the plaintiffs have proposed, and  
13 we don't think we should do that. That doesn't make any sense  
14 in terms of time or resources in this case.

15 THE COURT: Mr. Haefele.

16 MR. HAEFELE: Your Honor, yes, thank you. It's Robert  
17 Haefele.

18 I think they're jumping the gun a little bit when they  
19 say that they are entitled to it. I understand their argument  
20 that if they are entitled to that privilege because of their  
21 relationship among the counsel, then there may be some  
22 privilege that attaches similarly to the way the plaintiffs  
23 have communicated.

24 But the problem is that they are just assuming that  
25 they are entitled to the privilege, and I don't know that they



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1 have met the requirements for the joint defense privilege. And  
2 that's probably the one area that we thought most likely to be  
3 an area where we should be briefing it.

4 I understand your Honor's reluctance to have briefing  
5 on the entire idea of a privilege log, but the issue of whether  
6 the defendants are entitled to that sort of protection is an  
7 area that we think is one that's ripe for being briefed.

8 We have asked them repeatedly why they think they are  
9 entitled to that, and they can't come up with any explanation  
10 other than to say, Well, we are, because we've been working on  
11 this together.

12 I don't think that just because they've been working  
13 on it together suffices to meet the standard, particularly when  
14 throughout the course of the litigation there have been  
15 multiple instances where they have stressed that they can't  
16 work together because they have differing interests. I mean  
17 there's several circumstances where we've relied upon them  
18 working together, thinking that they were, only to find out  
19 that some of the defendants claim that they took a different  
20 position because they had different interests.

21 THE COURT: Although that certainly can be said as to  
22 certain issues of the plaintiffs, as well.

23 MR. HAEFELE: To a much different degree and in a much  
24 different way, your Honor.

25 First off, I think the differing interests that were

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1 pointed out to your Honor were with the Havlish (ph) plaintiffs  
2 who aren't in this case anymore. And that's the only instance  
3 they've been able to come up with.

4 But what we were looking at was at the inception of  
5 this entire litigation, as put in the letters to your Honor, so  
6 I'm sure you're familiar with it, but at the inception of the  
7 litigation, we wanted them to be on the same page together, and  
8 they refused to. They said they can't do it because of  
9 differing interests. They took to making us their own rules  
10 that applied to themselves. And that's what was put into the  
11 CMO that applied to the defendants.

12 So when they were asking for a common interest, we  
13 went back and said, What are the interests that they at the  
14 inception of this litigation recognized to be common among  
15 themselves, and they were very limited.

16 We're willing to go with that. But really, to say  
17 that they are entitled to across-the-board privilege sort of  
18 goes beyond what they've been saying all along, unless they can  
19 come up with an explanation that's better than what they've  
20 given, which is what we think the briefing would do. At least  
21 give them that opportunity.

22 MR. COTTREAU: Your Honor, Steve Cottreau again.

23 Just to start with, let me just say that we're not  
24 proposing in any way, although we would want it to be parallel,  
25 that if the plaintiffs are taking the position that we don't

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1 have common interests because we're all codefendants in this  
2 case and coordinating on strategy and on other procedural  
3 matters, then we would take the same position with respect to  
4 plaintiffs and the Havlish plaintiffs. But we're not  
5 suggesting they go through that burden, because really it's of  
6 little utility in this case. And similarly, for us to go  
7 through, again, what is thousands of emails is of little  
8 utility, because putting even aside common interests, which  
9 I'll address in a minute, it's all work product. All of these  
10 emails were prepared in anticipation and in relationship to  
11 this litigation. And it's all work product privilege for that  
12 reason.

13 But even beyond that, it's also common interest  
14 privilege, because all of us share an interest in coordinating  
15 on the matters that we've been coordinating on with respect to  
16 procedural matters, whether there's any overlap in the parties'  
17 defenses, and so forth. I don't really think it's any less  
18 straightforward than the plaintiffs' case is, quite frankly.

19 MR. HAEFELE: Your Honor, this is Robert Haefele  
20 again.

21 May I?

22 THE COURT: Yes, please.

23 MR. HAEFELE: This is the problem: This is the sort  
24 of thing that should have been briefed and brought to your  
25 Honor in a briefing process where we're unable really to test

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1 what the defendants -- what the merits of the defendants'  
2 claims are. And, you know, we were hit with this at the last  
3 minute. They haven't briefed it; they haven't put it before  
4 the Court in a fully -- in a manner that articulates why they  
5 are entitled to it other than just saying because we are.

6 And we've asked them repeatedly, and they haven't been  
7 able to explain it. I'm a little concerned that what we're  
8 getting is an eleventh-hour submission to the Court that  
9 doesn't fully brief it, and we're being asked to respond to  
10 something that hasn't been fully flushed out yet.

11 THE COURT: I've written a number of decisions,  
12 admittedly several years ago, as to both common interest  
13 privilege and work product.

14 And, frankly, when I was reading the letters and the  
15 proposed stip, one thing that occurred to me was even if in  
16 particular areas plaintiffs were able to show that common  
17 interest privilege should not apply, it seemed to me that work  
18 product was likely to, and there, if I recall the law  
19 correctly, the issue is whether sharing the information amongst  
20 counsel increases the likelihood that somebody on the other  
21 side will learn it. And I think even if there was some  
22 divisions amongst defense counsel, that would be a difficult  
23 showing to make.

24 I'm not going to entertain briefing on this issue, but  
25 I will consider it. I have at least in fax form the proposed

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1 stipulation and order with some redlining, but I don't have it  
2 in electronic form; so I'd ask that somebody undertake to send  
3 it to my chambers in electronic form at the end of this call.

4 The related issue is when the start date should be  
5 where the defendants are saying September 11, 2001, and  
6 plaintiffs are arguing for a later date; correct, Mr. Haefele?

7 MR. HAEFELE: Yeah.

8 Your Honor, I think what our position is, to fully  
9 flush it out, whatever date they say is the date that their  
10 obligation to preserve documents, whatever date attaches to  
11 that is the date when that privilege should apply.

12 THE COURT: And correct me if I'm wrong, does that  
13 mean that for different defendants or groups of defendants the  
14 date may vary?

15 MR. HAEFELE: Well, it may, your Honor, unless the  
16 date -- unless the Court implements a date that says, All  
17 right, your date for protecting your documents attaches on  
18 such-and-such a date.

19 But other than that, yes, I would imagine that to the  
20 extent that a defendant claims they had no obligation to  
21 preserve documents until, you know, they got served with the  
22 complaint, then any communications before that, that, it seems  
23 to me, should not be privileged either.

24 THE COURT: And just following through, it seems to me  
25 if I had a date that I could discern, the date would likely be

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1 September 11th, 2001, rather than the default date in the way  
2 you describe.

3 Let me hear the defendants' position.

4 Somebody want to say something on behalf of the  
5 defendants as to this?

6 Did we lose defense counsel?

7 MR. COTTREAU: Your Honor, it's Steve Cottreau.

8 I'll defer to your judgment on this issue.

9 I think this is a matter where the plaintiffs have  
10 come in with a proposal on Friday evening, and the reason why  
11 you're hearing a lot of silence is we didn't have an  
12 opportunity to confer on our side.

13 THE COURT: There is some attractiveness, frankly, to  
14 the notion that one side or the other might be hoist on -- I  
15 forget whether it's "on" or "by" its own petard in the sense  
16 that if somebody says the duty to preserve arose after  
17 September 11th, then at least insofar as work product is  
18 claimed, it would be difficult to argue for work product  
19 protection prior to that date. I may well conclude with  
20 respect to work product that the plaintiffs' alternative  
21 formulation is the correct one.

22 In any event, if counsel arrange to email to my  
23 chambers as an attachment the various proposed stipulations,  
24 we'll try to get something out this week.

25 Any other issues we ought to take up? I suppose

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1 there's no date for further conference, and perhaps we ought to  
2 talk about that.

3 MR. HAEFELE: Your Honor, I think there are a few  
4 smaller discrete issues that were raised regarding the  
5 privilege log, as well.

6 THE COURT: Okay. Go on, Mr. Haefele.

7 MR. HAEFELE: I think there were a number of competing  
8 proposals that I'm sure your Honor doesn't necessarily need to  
9 hear argument on; but if you do, that's fine.

10 But it really deals with the different things that  
11 would be required to be included in the log. And I think the  
12 defendants have gone strictly with the local rules, and we had  
13 gone with the local rule plus the article that your Honor had  
14 recommended to us from the judge in D.C.

15 And then the last item is a bit smaller item, which is  
16 whether or not the date that's included in the privilege log is  
17 a western date versus a nonwestern date. For example, the date  
18 that was used in Saudi Arabia.

19 THE COURT: Right.

20 And let me take those in reverse order.

21 The date issue is not one I've encountered previously.  
22 And just in terms of organization of a privilege log, if it's a  
23 nonwestern Arabic date, I'm not sure how one puts that in that  
24 privilege log. Is it a graphic image? Is it using an Arabic  
25 typeface? Can you sort by Arabic dates?

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1 MR. HAEFELE: The problem would be, to answer that --  
2 it's Robert Haefele again.

3 To answer that, it would probably be in letters that  
4 you and I could read; but the title would be a different title,  
5 and it would have a different year; it would say like 1410 or  
6 something like that. And it would give a month and a different  
7 word that doesn't correlate with our January through December.  
8 And the problem would be you would have western dates mixed in  
9 with nonwestern dates.

10 I think what I was trying to do, your Honor, what the  
11 recommendation was, when a privilege log comes to us or goes to  
12 them or it should come to you, it would be in a format that  
13 would be put in date order, and it would be easier to do that  
14 if they were all in the same language, so to speak.

15 THE COURT: Before I hear from the defense, there were  
16 also several additional fields that you wanted, one of which  
17 was Bates number. And I certainly think Bates number. ought to  
18 be provided for hard-copy documents and, to the extent that it  
19 can be done, for electronic documents or as an alternative,  
20 perhaps hashmarks.

21 As to some of the other fields, I'm trying to put my  
22 hands on the plaintiffs' version -- yeah, document length and  
23 file size I'm not sure, as a general matter, is relevant. I  
24 could understand at a later stage where plaintiffs, for  
25 example, might not wish to challenge a document which appears



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1 to be so short as to be meaningless. And at that stage, it  
2 might be helpful; but for all of the documents, I think it's a  
3 colossal waste of time.

4 So let me hear from the defendants.

5 MR. MOHAMMEDI: This is Omar Mohammedi.

6 As far as the date, they are not written in different  
7 characters, it's just the same numbers; only difference would  
8 be the date, which is the Islamic date, as well as the number.  
9 The difference would be like 517 years. And I don't think the  
10 plaintiff would have difficulty to just add that to be able to  
11 calculate the date on the western numbers, which is what we use  
12 here.

13 THE COURT: Except to the extent that a document  
14 doesn't list a year, in which case potentially it could be  
15 misleading. Although I guess if it doesn't list a year, by  
16 default it would drop to a different part of the list.

17 MR. MOHAMMEDI: Right.

18 So the document basically would be presented as how to  
19 they were dated. If they are dated in Hidri (ph), they would  
20 be presented a date in Hidri (ph). If they are dated in  
21 western date, they would be presented western date.

22 THE COURT: There was something that Mr. Haefele said  
23 when he was talking about Saudi Arabia that suggested that  
24 different countries might use different nomenclatures; is that  
25 also true?

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1 MR. HAEFELE: No, your Honor. I didn't mean to say  
2 that.

3 THE COURT: Okay.

4 MR. HAEFELE: I just said that I think the injury date  
5 that Mr. Mohammadi is mentioning is one that is most prominent.  
6 I guess I was allowing for the fact that there is a possibility  
7 that other corners of the world might use different dates. But  
8 I'll be honest and say that what he's in on is the one we were  
9 focused on.

10 MR. MOHAMMEDI: Hidri (ph) date are used by all  
11 Islamic countries.

12 THE COURT: I guess you also have the potential for  
13 some of the documents to have the European nomenclature in  
14 reverse month and date.

15 MR. MOHAMMEDI: Correct, your Honor.

16 THE COURT: Anything else that either side wishes me  
17 to consider in deciding what the protocol should be?

18 Is there agreement on email strings?

19 MR. HAEFELE: I think that the defendants wanted to  
20 put all of a chain of an email in together. And based on the  
21 reading of the article that your Honor has suggested to us, it  
22 seems that the more logical way to approach that is each email  
23 is, in effect, a separate document. So at some point,  
24 according to that, it seems to make more sense that you treat  
25 each email as a separate document.

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1           So each email -- the last email of a string for each  
2           item would be a separate document. And the rationale for that,  
3           your Honor, is when you're looking at, for example, an email  
4           that went to six different people, five of them not being a  
5           lawyer and one of them being a lawyer, and there being the  
6           representation that -- and not a client, there may be -- part  
7           of the chain may be privileged and part of the chain may not  
8           be.

9           THE COURT: I know that's a difficult area, and I will  
10          consider that.

11          Anything else related to the proposed protocol for  
12          privileged documents?

13          When should we hold our next conference?

14          MR. HAEFELE: Your Honor, we were going to propose  
15          that some time toward the end of November or perhaps the  
16          beginning of December, with the following two things in mind  
17          though:

18          Obviously the end of November we all know is the  
19          Thanksgiving time period, and the beginning of December is, at  
20          least for right now, the tentative date for the argument in the  
21          Second Circuit.

22          THE COURT: And you don't have a date, you just have a  
23          week, is that --

24          MR. HAEFELE: Well, I think the date -- and Mr. Carter  
25          may know better, but I think the date is December 3rd, I

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1 believe.

2 MR. CARTER: Your Honor, this is Sean Carter. It is,  
3 in fact, tentatively set for December 3rd. We understand that  
4 that's sort of an automated date that was generated just by  
5 virtue of the timing of the filing of the last reply brief.

6 THE COURT: Right.

7 MR. CARTER: And our expectation right now is that  
8 it's likely to be pushed simply given the volume of briefing  
9 and the size of the appendices.

10 THE COURT: Right.

11 Let me look at my calendar.

12 How about December 4th at 2 p.m. by telephone?

13 And what I'd suggest is that when you have the actual  
14 date and time for oral argument, you may wish to consider  
15 calling chambers to see whether I can schedule you later the  
16 same day so we can do it in person.

17 Does that work for everyone?

18 MR. HAEFELE: Works okay for us, I think. Yes, your  
19 Honor.

20 UNIDENTIFIED SPEAKER: Yes, your Honor.

21 THE COURT: I think the reporter will take down the  
22 chorus of okays.

23 Anything else from anyone?

24 Okay. Thank you all.

25 \* \* \*